United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants,*

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee.*

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HONORABLE CHASE CLARK, *Judge*

WALTER H. ANDERSON and GUS CARR ANDERSON,
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POINT AND AUTHORITIES

1. All reasonable doubts touching existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment and if the court has a reasonable doubt, summary judgment will not be granted.

Traylor vs. Black, Sivalls & Bryson, 189 F 2d 213,

Chappel v. Goltsman, 186 F 2d 215,

Arnstein vs. Porter, 154 F. 2d 464,

2. If there is any question as to the credibility of witnesses a summary judgment will be denied.

Ramsouer vs. Midland Valley R. C., 44 F. Supp. 523, reversed on other grounds, 135 F. 2d 101;

Boro Hall Corp. vs. General Motors Corp., 164 F. 2d 770.

3. The evidence presented at the hearing is liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence and all doubts

as to the existence of a genuine issue must be resolved against the moving party.

Whittlin vs. Giacalone, 154 F. 2d 20;

Parmelee vs. Chicago Eye Shield Co., 157 F. 2d, 582; 168 A.L.R. 1130.

Hawkins vs. Frick-Reid Supply Corp., 154 F. 2nd. 88;

Toelelman vs. Missouri-Kansas Pipe Line Co., 130 F. 2d, 1016.

4. Affidavits in support of summary judgment must be made on personal knowledge, shall set forth facts showing personal knowledge and setting forth facts which would be admissable in evidence as if affiant was a witness testifying in Court.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;

Sprague v. Vogt, 150 F. 2d, 795;

Rule 56(e) F.R.C.P.;

Federal Practice and Procedure by Barron and Holtzoff, Vol. 3, page 93, Sec. 1237.

5. Opinions, beliefs, conclusions, summary of fact or hearsay statements are inadmissable.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;

Sprague vs.Vogt, 150 F. 2d 795.

6. Where both parties are guilty of laches both parties will be left in the position in which equity originally found them.

Marshall vs. Meyer, 92 N.W. 693, 118 Iowa 508;

Mays vs. Morrell, 132 Pac. 714;

Loughran vs. Ramsburg, 197 Atl. 804, 808, 174 Md. 181.

7. One who is in peaceable possession of property under a claim of right may rest in security until his title or possession is attacked and the failure to appeal to equity during that period is no defense to a suit subsequently brought to establish, enforce or protect his right.

Cleveland Clinic Foundation vs. Humpherys, 97 F. (2) 849 certiorari denied, 59 S. Ct. 93, 305 U.S. 628, 83 L.Ed. 403, 121 A.L.R. 163;

Branford vs. Shirley, 193 So. 165, 238 Ala. 632;

Copelan vs. Monfort, 113 S.E. 514, 153 Ga. 558;

Lutton vs. Steng., 227 N.W. 414, 208 Iowa 1379;
30 C.J.S. 538, Sec. 116 (C)

8. While delay in enforcing a right is an element of laches, such delay has not in and of itself constituted laches.

30 C.J.S. p. 531 Sec. 116

ARGUMENT

I

THE PARTIAL GRANTING OF THE SUMMARY JUDGMENT IS NOT JUSTIFIED BY THE RECORD NOR DOES THE RECORD SUSTAIN APPELLEE'S CLAIM THAT IT DISCHARGED ITS BURDEN OF PROOF.

Reply to the Appellee's argument I, page 4 of its brief.

The Appellee conceeds that the burden of proving the lands were subject to an easement and that it had discharged the conditions imposed under the easement was with it. It then asserts that it made such proof at the hearing on its motion for summary judgment and that the trial court so held. The claim is without foundation and not supported by the record. The trial court's order regarding the Appellants' motion for summary judgment was as follows:

> "Now, therefore, the Court is of the opinion that the summary judgment should be granted in part as suggested at oral argument in that plaintiffs are bound by the release and easement agreement. This can be taken care of at the time of the trial.
>
> The summary judgment will be denied subject to the above reservation.
>
> In view of the above, the motion to strike certain portions of the affidavit of J. A. Hale in support of the motion for summary judgment will be denied, and it is so Ordered." (R. 47, 48)

If Appellee had sustained its burden of proof upon its motion for summary judgment the court would not only have held that Appellants' lands were subject to the easement but it would have granted wholly Appellee's motion for summary judgment.

At the hearing on Appellee's motion for summary judgment the Appellants moved to strike part of the J. H. Hale's affidavit, beginning with paragraph 3 to the end thereof. The affidavit, beginning at paragraph 3 among other things, set forth that the Appellee's power plant at Oneida, Idaho, during the months of December, 1948 and January 1949, was operated normally and that fluctuations of Bear River by reason of the operation of the dam at Oneida were no greater in the months of December, 1948 and January, 1949 than the fluctuations which occurred prior to December, 22, 1926, (R. 23, 27, 47) and is the evidence the Appellee seeks to rely on in sustaining its burdens of proof.

The trial court in granting the summary judgment in part, ruled that the Appellee had not met its burden of proof, that it had performed the conditions imposed upon it by the easement, and this is clear as the court in its ruling said that inasmuch as it was only granting the motion for summary judgment in part it was unnecessary to grant Appellants' motion to strike.

If Appellee was serious in its contention that it had met its burden of proof it would have cross-appealed from the trial court's order denying in part its summary judgment and would not rest its contention upon such an argument.

A brief consideration of J. A. Hale's affidavit will clearly show that the court did not and could not have ruled that the Appellee had met its burden of proof, as the affidavit on its face shows that his statements were based on hearsay and not upon personal knowledge. The affidavit set forth that Hale was a resident of Salt Lake City; Utah; that Oneida dam is located on Bear River in Franklin County, Idaho; that he was employed by Appellee from 1913 to 1923 as a civil engineer, when he became assist-

ant chief engineer, until 1926, when he became chief engineer and then in 1937 he was made vice-president in charge of engineering. He stated he was "familiar" with the construction of the Oneida dam, was "personally familiar with said dam, and personally familiar with its operation," that George Thomas presented a claim for damages for flooding and that the plant was operated normally in the months of December, 1948 and January, 1949 and that the fluctuation of Bear River was no greater during these months than that which occurred prior to 1926.

Oneida, Idaho, is approximately 125 miles north of Salt Lake City, Utah.

The affidavit does not say that Hale was employed at the Oneida dam, that he worked at the dam in December, 1926, or December, 1948 or January, 1949, that he was ever in charge of the dam or had anything to do with its operation or control of the water flow through the dam. The only information that Hale could give regarding such operations would be hearsay based on reports of others. This would be particularly true after 1937 when he became its vice-president in charge of engineering. The Hale affidavit showed on its face that he did not have personal knowledge of the fact set forth therein and that it was based on hearsay, and it did not set forth facts showing that his statements were based on personal knowledge, a primary requirement of an affidavit in support of motion for summary judgment.

An affidavit in support of a summary judgment must not only allege that affiant had personal knowledge of the facts but it must set forth facts personally showing that he had such knowledge, and summary judgment cannot be based upon opinions, beliefs, conclusions and hearsay.

Walling vs. Fairmont Creamery Co., 139 F. 2d 318;
Sprague vs. Vogt, 150 F. 2d 795;

Rule 56(e) F.R.C.P.;

Federal Practice and Procedure by Barron and Holtzoff, Vol. 3, page 93, Sec. 1237.

Furthermore, the affidavit of Evelyn P. Griffeth filed in opposition to Appellee's motion for summary judgment put in issue the question as to whether Appellee had performed the conditions imposed upon it under the terms of the easement. The affidavit of Evelyn P. Griffeth stated as follows:

> "Evelyn Griffeth, being first duly sworn, deposes and says: That she lives in Franklin County, Idaho, and that she is seventy years old; that she has lived upon lands adjoining the lands involved herein, now owned by Melvin Griffeth and his wife, and above and east of said lands on said river; that this affiant knows of her own personal knowledge that for forty-five years, with the exception hereinafter noted, she has lived upon same and that the said river never was out of its channel.
>
> "That in January, 1949, the said river overflowed its channel on said land and deep enough on said lands of said Melvin Griffeths at said time to reach to the armpits of her son Von Griffeths when he went out on the said lands of Melvin Griffeths to try to save cattle while the river had risen; that all of these things are of the personal knowledge of this affiant and are not based on anything somebody might have told her." (R. 45)

The basic facts which Appellee was required to show under its motion for summary judgment was that the flow of water which took place during the months of December, 1948 and January 1949 were not greater than the flow of water that took place on December 22, 1926, the date of the purported easement.

A summary judgment will not be granted if there is a conflict in the evidence.

Hoff vs. St. Mercury Indemnity Co., 74 Fed. 2d 689.

All reasonable doubts touching existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment and if the court has a reasonable doubt summary judgment will not be granted:

Traylor vs. Black, Sivalls & Bryson, 189 F. 2d 213, 216;

Chappel vs. Goltsman, 186 F. 2d 215,

Arnstein vs. Porter, 154 F. 2d 464.

The burden of demonstrating clearly that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against the moving party:

Whittlin vs. Giacalone, 154 F. 2d 20;

Parmelee vs. Chicago Eye Shield Co., 157 F. 2d 582; 168 A.L.R. 1130.

The evidence presented at the hearing is liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence and all doubts as to the existence of a genuine issue must be resolved against the moving party:

Hawkins vs. Frick-Reid Supply Corp., 154 F. 2d 88;

Toelelman vs. Missouri-Kansas Pipe Line Co., 130 F. 2d 1016;

Whittlin vs. Giacalone, 154 F. 2d 20.

The Appellee's contention that the Appellants admitted the existence of an easement to flood is without foundation. Upon the hearing of Appellant's motion to amend its complaint to include other lands under lease by Appellants the Appellee protested that it had an easement to this

land as well and Appellants agreed that its answer asserting an easement would include the lands covered by the amendment. There was no admission that the lands of the Appellants were subject to an easement. (R. 59, 63)

To the Appellee's argument that the easement granted it the right to flood Appellants' land, we refer the court to Appellants' arguments in their brief. However, to the Appellee's contention that unless the agreement granted it a right to flood the Appellants' lands it would have contracted for an idle and useless thing, we would like to point out that such is not the case as the right to manipulate and fluctuate the stream at the power plant was primarily the matter in which they were concerned as this right affected the daily operation of its power plant at Oneida. When it contracted for the right to fluctuate the water as it flowed through the lands of the Appellants it was assuring itself of the daily operation of its power plant without being subject to damages and complaint for the interference with the flow of the water, a violation of the right to have the stream flow undiminished in quantity through the property, and it relieved it from the responsibility of the damages incurred by the interference with and the changing of the lands' water table. It was of such importance to Appellee that in paragraph 2 of the agreement Appelle secured a release for damages occuring prior to December, 1926 for damages caused "or by the fluctuation of the flow of the river." We believe that from a reading of the entire agreement, including the granting clause, it can fairly and reasonable be said that all the Appellee was interested in by way of an easement was to secure itself in the daily operation of its power plants at Oneida and elsewhere against claims for the manipulation and fluctuation of the flow of the river and it was satisfied to secure a personal release from the Appellant's predecessors in interest for future damages for flooding or depositing ice.

II

THIS COURT'S CONSTRUCTION OF AN AGREEMENT TO FLOOD LANDS HAS NO APPLICATION EXCEPT AS DETERMINED THAT AN AGREEMENT TO FLOOD LANDS IS AN EASEMENT PERTINENT TO THE LAND RATHER THAN A PERSONAL OBLIGATION.

Reply to Appellee's Argument No. 1, of brief page 16. The only application here of the case of Luama vs. Bunker Hill & Sullivan Mining Company, 41 F. 2d 358, is that an agreement to deposit tailings in to a stream and upon the lands of another is an easement appurtinent to the land, covenant running with the land rather than a personal obligation. It holds that although there is no servient estate yet it will be construed as an easement pertinent rather than an easement in gross. Except as stated it has no application to the case involved and it does not dispose of the question as to whether by the terms of the grant in question the Appellee's easement is limited to a right to fluctuate the stream as it passes through Appellant's lands or whether it has a right to flood or deposit ice, conditionally, thereon. Furthermore, it is no help in determining, assuming Appellee has the right to flood Appellants' land conditionally that such right covers a flooding not originating from the channel as it passes through the lands of the Appellants.

III

APPELLANTS' EFFORT TO PROVE THAT THEIR LANDS WERE NOT SUBJECT TO THE EASEMENT BY REASON THAT THE EASEMENT WHEN GIVEN WAS SUBJECT TO THE RIGHTS OF THE PARTIES IN POSSESSION WHEN EXECUTED IS NOT BELATED AND LACHES DO NOT APPLY.

Appellee Argument 1-B, P 17 its brief.

It should be pointed out that the Appellants are no more guilty of laches than the Appellee. The Appellants

had the same notice. The Appellee is charged with the notice of Appellants and Appellants' predecessors in interest claims to the land, and during this time the Appellee did nothing to establish the validity of its easement as against the Appellants or their predecessors in interest. Appellants did assert their claim as soon as any damages accrued and in this respect were not guilty of delay. It is a recognized rule in equity that where both parties are guilty of laches both parties will be left in the same position in which equity originally found them, and this is certainly the case here. Neither the Appellants nor their predecessors in interest sought to remove nor did the Appellee seek to sustain the easement. It is not for equity to take sides in such a situation and the law so holds. *Marshall* vs *Meyer,* 92 N.W. 693, 118 Iowa 508; *Mays* vs. *Morrell,* 132 Pac. 714. When both parties are at fault neither can assert laches against the other. *Loughran* vs. *Ramsburg,* 197 Atl. 804, 808; 174 Md. 181. In this connection the Appellants have asserted their rights as soon as they were injured and there was no delay in the exercise of that right. The easement is a collateral issue. One who is in peaceable possession of property under claim of right may rest in security until his title or possession is attacked and the failure to appeal to equity during that period is no defense to a suit subsequently brought to establish, enforce or protect his right. *Cleveland Clinic Foundation* vs. *Humpherys,* 97 Fed. 2d 849, certiorari denied, 59 S. Ct. 93, 305 U.S. 628; 83 L.Ed. 403, 121 A.L.R. 163; *Branford* vs. *Shirley,* 193 So. 165, 238 Ala. 632; *Copelan* vs. *Monfort,* 113 S.E. 514, 153 Ga. 558; *Lutton* vs. *Steng,* 227 N.W. 414, 208 Iowa 1379. This is exactly what happened here. The Appellants' right was exercised upon the Appellee flooding of Appellants' land and they are not guilty of laches for now attacking the purported easement.

The question of laches was never before the court

either by answer or motion for summary judgment. (R. 19, 23.) The motion for summary judgment did not specify laches as a basis for its motion. It is true that on the date of the hearing of the motion for summary judgment that the Appellee filed an affidavit to the effect that George Thomas, one of the grantees, was dead. However, nothing was set forth in the affidavit to the effect that Anna E. Thomas, wife of George Thomas, was either dead or alive or whether she had any knowledge regarding the transaction involving the granting of the contract. (R. 46; 34.) As the motion for summary judgment did not set forth laches as a ground, this question was not before the trial court and the granting of the summary judgment on this ground cannot be sustained.

In any event, the only evidence before the court as to laches was the element of delay and while delay in enforcing a right is an element of laches such delay does not in and of itself constitute laches and the court could not have held that the doctrine applied provided the question had been presented to it. 30 C.J.S. p. 351, Sec. 116.

IV

THE RECORD ESTABLISHED THAT THE DAMAGES SUSTAINED BY THE APPELLANTS WERE PROXIMATELY CAUSED BY THE ACTS OF APPELLEE AT ITS ONEIDA DAM.

Reply to Appellee's Argument II, page 22 of its brief.

There is no basis for the Appellee's contention that the Appellants failed to show that their damages were caused by the acts of the Appellees. It bases its claim on a failure to show negligence. In this respect we again call the court's attention to the Idaho decisions at page 26 of Appellants' brief. The cases clearly set forth the rule in Idaho to be

that where one creates an obstruction to the natural flow of water or so handles the obstruction that a person's property is injured he has a good cause of action. The showing of negligence is not essential. All the injured party has to establish is that the obstruction or handling of the obstruction caused the injury. However, as pointed out in Appellants' brief, Appellants' proof went farther than was required under the Idaho decisions and they established that the Appellee was guilty of negligence in the handling of its dam at Oneida and that such was the proximate cause of the injury complained of. Appellants' evidence established that their property was approximately fourteen miles down stream south of Appellee's dam at Oneida; that all of the water coming down Bear River at Oneida must pass through the dam; that prior to the erection of the dam in the winter months the river would freeze over, water running under the ice and never flooded, that after the erection of the dam the Appellee interfered with the flow of the water manipulating and controlling it as it saw fit, releasing such quantities of water as it elected; it would send forth small quantities in the morning and larger quantities in the afternoon and in the winter instead of ice forming over the channel as it did prior to the erection of the dam, with the water running under it, ice would form when limited amounts of water were released at the dam breaking up when larger quantities were released. This ice would settle to the bottom of the river and then was broken loose upon the release of additional water, causing ice jams to occur in the river. It was one of these ice jams and the sending of large amounts of water down the river which caused the flooding of Appellants' lands. That during the period when Appellant's lands were flooded the evidence established that the Appellee was releasing more water from the dam than it was accumulating in its water storage facilities at the

Oneida dam and elsewhere up stream than flowed into such facilities from Bear River's natural water shed. The evidence further established that the Appellee was warned by Melvin Griffeth, one of the Appellants, that if it continued to regulate the water as it was doing his land would be flooded and Mr. V. D. Smart, maintenance foreman of the State Highway Department also warned Appellee that ice jams were forming near the Preston-Dayton River bridge flooding over the road and unless it did something about it he was afraid the bridge would be lost.

The Appellee ignored these warnings and did not change its operation of the dam at Oneida and continued to manipulate the flow of water and released from its dam at Oneida more water than flowed into the river from its natural water shed.

Appellee ignores in its argument all of the foregoing facts seeking to avoid liability by reason of cold weather asserting that the cold weather was the cause of the ice jams. Unquestionably the cold weather did contribute to the formation of the ice jams. However, it was only one fact in connection with the other conditions hereinabove mentioned which caused the ice jams to form and flood Appellants' lands. True, it was a cold winter but Appellee knew and it knew it better than anyone else for it kept daily temperature readings. Certainly these conditions imposed upon Appellee the duty of regulating the water as it flowed down Bear River as not to create conditions which would result in the flooding of Appellants' land.

We respectfully submit that Appellants established a case under the Idaho authorities and we believe that the record sustains us, if necessary that Appellee was negligent in the operation of its dam, and that such was the proximate cause of Appellants' damages. In this respect we again call this court's attention to its decision in the case

of *Inland Power & Light Company* vs. *Greiger,* 91 F. 2d 811. The Appellee does not challenge this decision and its application.

CONCLUSION

In conclusion we believe the trial court's decision should be reversed and the cause remanded with instructions to submit the matter to a jury.

Most respectfully submitted,

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